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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MELVIN BYE et al., Plaintiffs and Appellants, v. RITZ-CARLTON HOTEL, LLC, Defendant and Respondent.	B203386 (Los Angeles County Super. Ct. No. GC036746)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. De Vanon, Jr., Judge. Affirmed.

Law Offices of Dori N. Bye and Dori N. Bye for Plaintiffs and Appellants.

Wesierski & Zurek and Paul J. Lipman for Defendant and Respondent.

INTRODUCTION

Plaintiffs Melvin Bye and Eugenia Bye appeal from a summary judgment in favor of defendant Ritz Carlton Hotel, LLC. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Melvin Bye (Melvin) and his wife, plaintiff Eugenia Bye (Eugenia),[1] checked into the Ritz-Carlton Hotel Pasadena, also known as the Ritz Carlton Huntington Hotel, (hotel) on April 22, 2004. Defendant Ritz Carlton Hotel, LLC (defendant) owned and operated the hotel. Shortly after checking in, Melvin began running the shower to get the water hot before he took a shower. There was no mat in the tub. After three to four minutes, he stepped into the tub with his right foot. As he attempted to put his left foot in the tub, he began slipping, grabbed the grab bar, but ultimately fell.

After the fall, Melvin shouted to Eugenia, who was not in the bathroom, "Watch out for this shower. It's very slippery inside this tub." After he got out of the tub, he said to her, "There's some sort of substance on this tub that makes it very slippery and oily."[2] Melvin's comment was "based on my foot going out from under me." He did not try to touch the surface of the tub with his finger to identify the substance. His only contact with the substance was with his bare foot as he began slipping. He looked at the bottom of the tub but was not able to see anything separate and distinct from the surface of the tub.

Melvin put a cotton mat on the bottom of the tub before Eugenia came to shower so that she would not fall. Eugenia stepped onto the mat in the shower. She did not

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1 We use plaintiffs' first names to avoid confusion and intend no disrespect.

2 The facts about plaintiffs' statements and actions related to the fall are taken from excerpts of plaintiffs' depositions which defendant submitted as part of the papers supporting its motion for summary judgment.

attempt to touch the tub but described the area around the edges of the mat as "shiny." Melvin notified the hotel of his fall and requested a rubber bath mat.

Plaintiffs filed a complaint on February 24, 2006, alleging causes of action for negligence, premises liability and strict products liability. Plaintiffs alleged that the bottom of the tub surface was slippery and slick due to the absence of safety measures such as rubber mats, and that the slippery condition was created by the failure of the cleaning staff to rinse the tub properly after cleaning. The trial court granted, without leave to amend, defendant's demurrer to the strict products liability cause of action. The action continued as to negligence and premises liability.

Defendant filed a summary judgment motion on February 28, 2007 on the ground that plaintiffs had no evidence of a slippery substance or residue on the tub. Defendant asserted that plaintiffs based their claims solely on the testimony of plaintiff that his foot felt a slippery and oily substance, and under *Buehler v. Alpha Beta Co.* (1990) 224 Cal.App.3d 729, such testimony was speculative and did not constitute evidence necessary to support their claims.

Defendant supported its motion with affidavits and declarations from hotel personnel. In his declaration, Donnell Pingarron, Assistant Director of Loss Prevention, indicated that no other tub falls or complaints were reported during a period from at least a year before the accident to the 2007 date of the declaration. In his declaration, Gerardo Ramirez, former Assistant Chief of Engineering at the hotel, reported that the hotel's records showed that an anti-slip high-traction granulated coating had been applied to the tub in 2001. The anti-slip coating was still in place when the tub was inspected and photographed by defendant's investigator two months after the accident, no intervening work having been done on the tub.

In his declaration, defendant's slip and fall expert, Ned Wolfe (Wolfe), indicated he tested the tub in room 414 for "surface traction, that is, how a surface reacts, when wet, to a moving surface such as a foot which is incident upon it." He reported that his testing, after applying the hotel's spray cleaner and also water alone to the tub bottom surface, yielded measurements above "the utilized traction threshold . . . as established by

ASTM" standards. In his opinion, if any cleanser had been on the surface, "the slip index would have been safe to bathers." Wolfe's declaration also set forth his opinions that, running water on the cleanser, as plaintiff had done, would wash it away, and that the granulated "coating is a safe and acceptable treatment for bathtub surfaces, and exceeds industry custom and practice for traction wet and dry" and contributed to "the increased coefficient of friction."

Defendants submitted the declaration of Josephina Cisneros (Cisneros), in which she identified herself as a 14-year hotel employee and the person who cleaned room 414 on the day that plaintiffs checked into the hotel. In her declaration, Cisneros explained that she used the method she always used to clean tubs, that is, she cleaned the tub with a spray cleanser, rinsed the tub with hot water, and toweled the tub dry. The Assistant Director of Housekeeping for the hotel, Kaipo Henrikson, stated in his declaration that Cisneros had no history of failing to clean tubs properly, and he attached the housekeeper's log showing that Cisneros cleaned the room on the date plaintiffs checked into the hotel.

Defendant submitted Melvin's deposition statement, that his feeling that the tub bottom was oily and slippery was based on his foot going out from under him. Also, he stated that, after the fall, he never touched the tub with his hand or visually inspected the tub's bottom surface to check for any substance. He never attempted to show any area on the tub to the hotel management staff who came to his room in response to his call to report the accident. Defendant also cited Eugenia's deposition testimony that she did not touch the tub's bottom surface; she stood on a mat put into the tub, and she could only see around the edges of the mat that the tub was shiny.

Plaintiffs submitted a declaration of their slip and fall expert, Charles E. Turnbow (Turnbow), stating that defendant's expert, Wolfe, used the wrong test and that the hotel was required to have two grab bars, one on the back wall and the other on the non-service

wall, under the applicable ASTM standard.[3] Turnbow reported that he had tested three tubs, none of which was in the hotel. He opined that "[a] slipping action such as the one described by the plaintiff only occurs when there is insufficient traction between the foot and the tub surface to retard the forces generated while stepping," but gave no factual or analytical basis for the opinion.

In its reply to plaintiffs' opposition to the motion for summary judgment, defendant submitted another declaration in which Wolfe provided a detailed explanation of the reasons the test he used was "the closest Standard" at that time to measure bathtub slip resistance and that the tester in the protocol Turnbow mentioned had been invalidated. Wolfe also stated that the grab bar standard cited by Turnbow was a voluntary standard and opined that it would be "speculative whether a grab bar on the service end would have prevented plaintiff's fall."

The trial court granted summary judgment in favor of defendant[4] on the grounds that defendant established that plaintiffs lacked any nonspeculative evidence of the tub's slipperiness, and therefore, plaintiffs could not establish that the fall was caused by any negligent act or omission on the part of defendant, citing *Buehler v. Alpha Beta Co.*, *supra*, 224 Cal.App.3d 729.

DISCUSSION

On appeal from a summary judgment, our review is de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) We look beyond the parties' contentions as

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3 Turnbow identified the standard as ASTM F-446-85 (Reapproved 2004) *Standard Consumer Safety Specification for Grab Bars and Accessories Installed in Bathing Area.*

4 The minute order states: "Defendant has established that plaintiffs lack any nonspeculative evidence of the tub's slipperiness. Plaintiff Melvin Bye testified that he did not see any residue and did not rub his hand on the tub or do anything else to try to see if there was something on the su[r]face of the tub that would cause his fall . . . . Plaintiff cannot establish that his fall was due to any negligent act or omission on the part of defendant without such evidence."

well as the trial court's rationale for its ruling and independently determine if summary judgment is merited based on the admissible evidence in the record before us. (*Zavala v. Arce* (1997) 58 Cal.App.4th 915, 925-926; *Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.)

Summary judgment properly is granted if the admissible evidence in the papers submitted by the parties "show[s] that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) When, as in the instant case, the defendant is the moving party, the defendant must either demonstrate an absence of an essential element of the plaintiff's case or establish a complete defense to the plaintiff's action. If the defendant fails to do so, summary judgment must be denied. (*Stratton v. First Nat. Life Ins. Co.*, *supra*, 210 Cal.App.3d at p. 1083.) If the defendant meets its burden, then the burden shifts to the opposing plaintiff to show that a triable issue of fact exists as to the cause of action or the defense. (*O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 804.) If the plaintiff fails to make such a showing, then summary judgment should be granted. (*Stratton*, *supra*, at p. 1083.)

With respect to the evidence offered by either party to meet its burden, Code of Civil Procedure section 437c, subdivision (d), authorizes the use of affidavits or declarations. When, as in the instant case, the defendant is the moving party, the defendant's affidavits are strictly construed by the trial court, and the opposing plaintiff's affidavits are liberally construed; any "doubts about the propriety of granting the motion are resolved by denying summary judgment, due to the drastic nature of the procedure." (*Stratton v. First Nat. Life Ins. Co.*, *supra*, 210 Cal.App.3d at p. 1083.)

On appeal, the same general principles apply to our review of a summary judgment ruling. (*Stratton v. First Nat. Life Ins. Co.*, *supra*, 210 Cal.App.3d at p. 1083.) We examine the facts presented to the trial court and independently determine their effect as a matter of law. (*Ibid.*) We review the trial court's ruling, not its rationale. (*Ibid.*)

Plaintiffs contend that defendant failed to meet its burden of showing that plaintiffs cannot establish breach of duty and, therefore, the summary judgment must be reversed. We disagree.

As plaintiffs assert, the elements of a negligence cause of action are duty of care, breach of duty, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) Negligence under a premises liability theory is based upon the principle that an owner of business premises such as the hotel owes a duty to its invitees such as the hotel guests to exercise reasonable care in keeping the premises reasonably safe, and free from dangerous conditions, for its invitees. (*Ibid.*; *Oldenburg v. Sears, Roebuck & Co.* (1957) 152 Cal.App.2d 733, 741.) To be held liable for injury to an invitee, the owner must have either actual or constructive knowledge of a dangerous condition, or have been able to discover the condition by exercising ordinary care, and must have failed to remedy the dangerous condition, such failure then causing injury to an invitee. (*Oldenburg*, *supra*, at p. 743.)

The inference from the trial court's statement of its grounds for granting the summary judgment motion is that defendant demonstrated that plaintiffs could not establish that there was a dangerous condition that caused Melvin's fall and, hence, his injury. Plaintiffs assert that Melvin's deposition testimony that his bare foot felt something oily and slippery on the bottom of the tub constituted substantial evidence that there was a dangerous condition. As support, plaintiffs cite statutes providing that a witness's personal knowledge may be shown by his own testimony based upon his perception through his senses. (Evid. Code, §§ 170, 702, subd. (b).) Plaintiffs presented no other evidence that an oily, slippery substance was on the bottom of the tub. In their deposition testimony, plaintiffs testified they did not take any other action to determine the presence of such a substance, such as touching the tub area, rubbing it with a cloth, or closely visually inspecting it, and they did not point it out to hotel management staff that came to their room promptly in response to Melvin's telephone call notifying hotel staff of the fall.

In *Buehler v. Alpha Beta Co., supra,* 224 Cal.App.3d 729, on which the trial court relied, the plaintiff invitee alleged that her slip and fall in the defendant's store was caused by an inappropriately slippery floor, due to either an unknown substance on the floor or improper waxing of the floor. (*Id*. at p. 733.) She did not see anything on the floor to cause her to slip and did not know what the cause was. (*Id*. at p. 734.) The *Buehler* court affirmed a summary judgment in favor of the defendant on the ground that the defendant had established a prima facie defense of no liability based on the lack of evidence of any slippery or otherwise defective condition. (*Id*. at pp. 731-732.) The court noted that a party such as the plaintiff invitee who opposes a summary judgment must show that "there is sufficient proof of the matters alleged to raise a triable question of fact if the moving [defendant's] evidence, standing alone, is sufficient to entitle the [defendant] to judgment." (*Id*. at p. 733.) The court held that "[c]onjecture that the floor might have been too slippery at the location where appellant happened to fall is mere speculation which is legally insufficient to defeat a summary judgment." (*Id*. at p. 734.)

Plaintiffs claim that *Buehler* is inapposite, in that Melvin unequivocally testified that his bare foot felt some substance in the tub that was slippery and oily, whereas the *Buehler* plaintiff did not know what caused her to slip and fall and an eyewitness did not know the cause. The *Buehler* court, however, was not concerned so much with what the plaintiff knew or whether the floor was slippery to some degree as it was with the lack of evidence that the floor was "too slippery" where the plaintiff fell, that is, that a dangerous condition existed. Although the plaintiff claimed that there was some substance, either too much wax or some unknown substance, the court found no substantial evidence of wax or any other substance creating a dangerous condition. (*Buehler v. Alpha Beta Co., supra,* 224 Cal.App.3d at p. 734.)

Cases on which plaintiffs rely are distinguishable from the instant case and do not support plaintiffs' claim that Melvin's statement constituted substantial evidence of a dangerous condition and, thus, raised a triable issue of material fact. Plaintiff cites statements by the court in *Roeland v. Geratic Enterprises, Inc.* (1960) 187 Cal.App.2d 280 that a jury could have found that the smooth cement floor in the shower where the

plaintiff fell was a dangerous condition, in that it was "common knowledge that such cement is slippery, especially when wet, and that the use of such floor in a shower area where water is always present created a hazardous condition of which defendant should have had notice by the very nature of the installation." (*Id.* at pp. 281-282.) In *Roeland*, there was no issue of whether an oily or soapy substance was on the cement floor and caused the plaintiff's fall. In the instant case, there is no issue that it was common knowledge that the tub surface was slippery. In fact, defendant submitted evidence that the tub had an anti-slip granulated coating and its slip index would be safe for bathers even if the spray cleanser was on the surface, which was not contradicted by plaintiffs' evidence. In the other cases plaintiffs cite, there was independent evidence of a foreign substance or wax which corroborated the plaintiff's claim that slippery material caused the plaintiff's fall.

In *Clayton v. J. C. Penney* (1960) 186 Cal.App.2d 1, the court expressly distinguished two cases as inadequate support for the *Clayton* plaintiffs' arguments, on the basis of the lack of evidence to support causation. The two cases are instructive to the issue here. In the first case, *Oldenburg v. Sears, Roebuck & Co.*, *supra*, 152 Cal.App.2d 733, the plaintiff slipped on a piece of chalk on the sidewalk in front of the store and claimed that the store had constructive knowledge of its presence and failed to exercise reasonable care to remove it, proximately causing the plaintiff's injury. (*Id*. at p. 743.) The court held that the plaintiff could not meet her burden to prove the essential elements of her cause of action "merely by proof that plaintiff invitee stepped on something while on invitor's premises and thereby was caused to fall and receive injuries." (*Id*. at p. 741.) The court cited the well-established policy that "'[i]f the existence of an essential fact upon which a [plaintiff invitee] relies is left in doubt or uncertainty, the [plaintiff invitee] upon whom the burden rests to establish that fact should suffer, and not'" the business owner. (*Ibid*.) The court confirmed that liability cannot be imposed "based on guesses or conjectures." (*Ibid*.)

The facts in the instant case closely resemble those in *Vaughn v. Montgomery Ward & Co.* (1950) 95 Cal.App.2d 553, the second case distinguished in *Clayton*. The

only evidence the *Vaughn* plaintiff presented was that she slipped and fell in the defendant's store, fracturing her kneecap, and that she claimed that her fall was caused by an oily, slippery, liquid substance which the defendant had negligently allowed to remain on the floor. (*Id*. at pp. 553-554.) The court explained that in most reported slip and fall cases, the plaintiff had offered evidence proving the existence of a dangerous condition created by the business owner or proof of some foreign substance on the floor. (*Id*. at p. 556.) The *Vaughn* court stated that "[t]ested by these standards, it must be held that, as a matter of law, the evidence fails to support the implied finding that defendant was negligent. Interpreted most strongly in favor of plaintiff, as it must be, . . . [t]here is no evidence of any foreign substance on the floor. There is no evidence that the floors were recently oiled or waxed. There is no evidence, in fact, that the floor was slippery. . . . To impose liability in the present case it would have to be held that where the evidence shows that an invitee has fallen in a store from some unexplained cause . . . , such evidence supports a finding of negligence. No decided case in this jurisdiction has stated such a rule." (*Id*. at p. 557.)

Under *Vaughn v. Montgomery Ward & Co.*, *supra*, 95 Cal.App.2d 553, Melvin's statement that his foot felt an oily and slippery substance does not constitute substantial evidence of a dangerous condition essential to maintaining an action for negligence or premises liability. (*Id*. at p. 557.) As the *Buehler* court characterized its plaintiff's purported "evidence," here Melvin's testimony that his foot felt something oily and slippery can be no more than a conjecture the tub may have been "too slippery," that is, that a dangerous condition existed. Therefore, his testimony is too speculative to constitute substantial evidence of such a condition and thus, it is "legally insufficient to defeat a summary judgment." (*Buehler v. Alpha Beta Co.*, *supra*, 224 Cal.App.3d at p. 734.) Accordingly, we agree with the trial court that defendant has demonstrated the absence of evidence of a dangerous condition, to wit, a slippery and oily substance, that caused plaintiff's fall. Without such evidence, plaintiffs cannot prove all of the essential elements in their causes of action. (*Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th at p. 1205; *Oldenburg v. Sears, Roebuck & Co.*, *supra*, 152 Cal.App.2d at p. 741.) Therefore, no

triable issue of material fact remains and summary judgment has been properly rendered. (Code Civ. Proc., § 437c, subd. (c).)[5]

DISPOSITION

The judgment is affirmed. Defendant is to recover its costs on appeal.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.

[5] Plaintiffs raise other tangential issues. Having resolved the appeal on other bases, we need not address the issues.